No. 15,235

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE H. COX, also known as George M. Cox,

Appellant,

vs.

ENGLISH-AMERICAN UNDERWRITERS and THE LONDON & LANCASHIRE INSURANCE COMPANY, LTD.,

Appellees.

Appeal From a Summary Judgment and Also From an Order Denying Motion for Leave to File Supplemental Complaint Made and Entered by the United States District Court for the Northern District of California, Northern Division.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

This is an appeal by the plaintiff (the insured under a policy of fire insurance issued by the defendant) from a summary judgment denying him recovery under the policy and from an order denying his motion for leave to file a supplemental complaint.

Summary judgment was granted on the ground that there had been no appraisal of the loss before the filing of the action and that, under the terms of the

policy, such an appraisal was a condition precedent to plaintiff's right to file the action. Leave to file a supplemental complaint (alleging that the loss was appraised after the filing of the original complaint) was denied on the ground that a complaint, which, as originally filed failed to state a cause of action (because of the plaintiff's failure to comply with a condition precedent to its filing) cannot be made to state a cause of action by alleging compliance with the condition precedent after its filing.

STATEMENT OF THE CASE.

On January 25, 1953, the insured premises were completely destroyed by fire (41).[1]

On March 20, 1953, within the sixty days allowed for that purpose by the policy, plaintiff filed a sworn proof of loss with defendant (17).

On April 29, 1953 (three months and four days after the fire), defendant requested that plaintiff submit to an examination under oath as provided for in the policy (21). The examination was scheduled for May 7, 1953, in Redding.

On April 30, 1953, defendant advised plaintiff that his proof of loss was defective in several respects and suggested that he file amendments thereto (22-23). Defendant further advised him (1) that it was neither admitting nor denying liability, (2) that it was not

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[1]All references will be to pages of the Transcript.

admitting the amount of loss claimed by him, and (3) that it was waiving none, and in fact was reserving all, of the terms, conditions or provisions of the policy (24).

Sometime within the next few days and, at any rate, before May 7, 1953 (within not more than three months and twelve days after the fire), plaintiff employed Messrs. L. C. Smith and Leander W. Pitman as his attorneys. Both have represented him ever since (44) and are now his attorneys on this appeal.

Plaintiff did not appear for the scheduled examination under oath. Instead, on May 7, 1953, Mr. L. C. Smith, wrote the following letter to the attorney who was to examine plaintiff under oath on behalf of defendant (26):

"Lawrence Kennedy, Jr., May 7, 1953
Attorney at Law
Courthouse, Redding, California

Dear Mr. Kennedy:

"I am writing in connection with the claim of George Cox, Policy No. P983103, upon which there has been a number of oral and written examinations, not less than four in number, some of which were reduced to writing and under oath, and now you want another one. After all, there is an end to this third degree some place.

"We regard your present action as not a reasonable request within the terms of the policy, but one to annoy and harrass these people as a substitute for your promise to pay in the event of a loss. For these reasons your request for another and additional oral examination is refused.

"When we bring suit, you will again have the right to take these people's deposition, if you feel so disposed. At that time they will be represented by counsel and the necessary interrogations will be confined and circumscribed by rules of evidence.

Very truly yours,

LCS:jss L. C. Smith"

This court will note that no mention of that letter is made in plaintiff's brief.

On June 11, 1953, plaintiff filed suit in the Superior Court of the State of California, in and for the County of Shasta. The record does not show when the complaint was served but, in any event, defendant's answer was filed on July 17, 1953, one month and six days after the filing of the complaint (25).

The case was tried on November 3 and 4, 1953. On November 4, 1953, a nonsuit was granted because of plaintiff's refusal to submit to the requested examination under oath (25-26, 53).

Although precious time had been lost as a result of plaintiff's refusal to submit to that examination, more than 2½ months still remained before the expiration of the 12-month period within which the policy required that suit be brought.

For the next 47 days, however, plaintiff chose to do nothing.

This court will note that, on page 9 of his brief, plaintiff accuses *defendant* of having done nothing

during that period. The point is, however, that there was nothing that defendant could have done until, on December 22, 1953, it received the letter (dated December 21, 1953) in which plaintiff finally offered to submit to an examination under oath (29-30).

It took defendant one day to answer that letter.

On December 23, 1953, defendant accepted plaintiff's offer to submit to an examination under oath and scheduled it for January 7, 1954. In the same letter, defendant also called for an appraisal of the loss, appointed its appraiser and requested plaintiff to appoint his (30-31).

That letter was apparently not received by plaintiff until January 6, 1954. Although plaintiff does not in so many words accuse defendant of having intentionally misdirected it, the implication is rather plain as to what he would like this court to believe. In fact, however, defendant's letter of December 23, 1953, was sent to the very address (Box 704, Redding, California) shown at the top of plaintiff's letter of December 21, 1953 (29-30). Where else defendant could or should have sent its reply is not made clear in plaintiff's brief.

On January 7, 1954, plaintiff was examined under oath.

On January 13, 1954, one week after he had received defendant's letter asking for an appraisal of the loss, plaintiff appointed his appraiser (32-33). On the same day, plaintiff mailed a supplemental proof of loss to defendant (33) (on page 9 of plaintiff's

brief, the supplemental proof of loss is erroneously said to have been mailed on January 3, 1954).

On January 15, 1954, plaintiff's appraiser wrote a letter to defendant's appraiser suggesting that they arrange to meet (35-36). That letter was received on January 17, 1954 (33).[2]

On January 22, 1954, plaintiff filed this action.

Under the terms of the policy, the appraisers must first select an umpire and are given 15 days to do so. On January 27, 1954 (within that 15 day period), defendant's appraiser telephoned plaintiff's appraiser for the purpose of arranging a meeting (34). For reasons of health as well as because of the weather, plaintiff's appraiser declined to do so (34).

On February 23, 1954, plaintiff's appraiser wrote another letter to defendant's appraiser requesting that the appraisal be further postponed (36).

On February 25, 1954, defendant's appraiser in turn wrote to plaintiff's appraiser requesting him to let him know when he would be ready to proceed (37).[3]

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[2]Although plaintiff seeks to convey the impression that the letter specifically stated that the appraiser would be available on any day of the next week (January 18 to January 22) for "consummating said appraisal", the letter did nothing of the sort. It merely stated when the appraiser would be available on weekdays (before 8 A.M. and after 5 P.M.) and when he would be available on Saturdays and Sundays (at any time) (36).

[3]As of October 4, 1954, when he executed an affidavit in support of the motion for summary judgment, defendant's appraiser had not been contacted by plaintiff's appraiser (34).

On March 16, 1954, after this action had been removed to the District Court of the United States, an answer was filed by defendant (7-13).

On September 21, 1954, plaintiff asked one of the judges of the Superior Court of the State of California, in and for the County of Shasta, to appoint an umpire (38-39).

On September 22, 1954, the umpire was appointed (40).

On October 25, 1954, defendant filed the motion for summary judgment which was ultimately granted by the District Court. At that time, there still had been no appraisal of the loss.

On January 4, 1955, the appraisal finally took place (60) and, on or about March 29, 1955, the award of the appraisers was filed with defendant (57). On the same day, plaintiff filed his motion for leave to file a supplemental complaint (54-63).

Summary judgment was granted on the sole ground that an apprasial of the loss was a condition precedent to plaintiff's right to recover under the policy.

On this appeal, plaintiff contends not only that an appraisal was not a condition precedent to recovery but also that, if it was such a condition, the requirement was waived by defendant.

Plaintiff also contends that an estoppel arose and that, in any event, he should have been allowed to file a supplemental complaint to show that the appraisal was completed in 1955.

Plaintiff argues of course that a number of genuine issues of fact remain in the case.

Finally, there is one other contention which pervades all of plaintiff's brief, namely, the highly emotional contention that this is just another case in which a big insurance company is taking advantage of a little policy holder and, by a series of dilatory tactics, is seeking to entrap him and defeat his just claim.

Our position is that an appraisal of the loss *was* a condition precedent to recovery, that there was no waiver and no estoppel and that leave to file a supplemental complaint was properly denied.

As far as other genuine issues of fact are concerned, it may be that such issues would arise in the case if the motion for summary judgment were decided adversely to defendant. This does not mean, however, that there should be a trial of those issues even though the entire case can be disposed of as a matter of law and in defendant's favor on the one issue raised by its motion.

SUMMARY OF THE ARGUMENT.

(1) Plaintiff alone was responsible for his failure to comply with the appraisal clause. None of the delay was caused by defendant. All of it was caused by plaintiff.

(2) Under those circumstances, compliance with the appraisal clause was a condition precedent to plaintiff's right to sue.

(3) Defendant did not waive its right to demand an appraisal.

(4) Nor was it estopped from insisting upon compliance with the appraisal clause.

(5) Leave to file a supplemental complaint was properly denied as the original complaint failed to state a cause of action.

ARGUMENT.

The policy involved in this action is a California standard form fire insurance policy. Its terms, which are statutory, are found in Section 2071 of the Insurance Code of the State of California. As far as material to this action, it provides as follows:

"Appraisal

"In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing,

so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally."

. . . . .

"Suit

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been compiled with, and unless commenced within 12 months next after inception of the loss."

Prior to 1950, Section 2071 of the Insurance Code contained substantially different appraisal provisions. Because some of the cases upon which plaintiff relies arose before 1950, we quote those provisions at length in the margin.[4]

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[4]"*Ascertainment of amount of loss.* This company shall be deemed to have assented to the amount of the loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, or, if verified amendments have been requested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments, the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto.

"If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such demand

Under Section 2071 as it now reads, both the policy holder and the insurance company may demand an appraisal. Prior to 1950, only the company had that right.

Under the old law, demand for an appraisal had to be made (by the company) within a specified period of time and the appraisal itself had to be completed within another specified period of time (unless delayed by the policy holder). As it now reads, however, Section 2071 specifies neither when demand for the appraisal must be made nor when the appraisal must be completed (except of course that it must be completed before suit is filed).

It may also be noted that, under the old law, the company was required to notify the policy holder in writing and within a specified period of time if it disagreed with the amount of the loss claimed by him

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and name, shall appoint a competent and disinterested appraiser and notify the company thereof in writing, and the two so chosen shall before commencing the appraisement, select a competent and disinterested umpire.

"The appraisers together shall estimate and appraise the loss or part of loss as to which there is a disagreement, stating separately the sound value and damage, and if they fail to agree they shall submit their differences to the umpire, and the award in writing duly verified of any two shall determine the amount or amounts of such loss.

"The parties to the appraisement shall pay the appraisers respectively appointed by them and shall bear equally the expense of the appraisement and the charges of the umpire.

"If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and completed within ninety days after said preliminary proof of loss is received by this company, the insured is not to be prejudiced by the failure to make an appraisement, and may prove the amount of his loss in an action brought without such appraisement." (Stats, 1935, ch. 145, p. 600).

in his proof of loss. As it now reads, Section 2071 contains no such requirement.

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(1) PLAINTIFF ALONE WAS RESPONSIBLE FOR HIS FAILURE TO COMPLY WITH THE APPRAISAL CLAUSE.

At least as early as May 7, 1953 (more than eight months prior to the expiration of the one-year period of limitation), plaintiff was represented by attorneys. Hence, it is preposterous to suggest that he was taken advantage of or entrapped.

We resent the charge that defendant sought to take advantage of or entrap plaintiff. But that is not the point. The point is simply that insurance companies have rights too.

It must be remembered that the policy issued to plaintiff was a statutory form of policy imposed by law upon defendant as well as plaintiff and not merely a contract between them. Its terms were *not* selected by defendant and then imposed upon plaintiff on a take it or leave it basis. On the contrary, defendant had no choice about them either.

This may not be the place to argue their wisdom but we do want to make it clear that we, at least, consider them very wise.

It is a matter of common knowledge of which we assume that this court can take judicial notice that policies of fire insurance on residential property are generally issued without an inspection of the insured premises. Concededly, they could be inspected but,

if they were, the cost of fire insurance would be much higher to all policy holders and, as to most of them, the expense of inspection and appraisal before issuance of the policy would be unnecessarily incurred since they would never have occasion to make a claim under their policy.

Instead of demanding ahead of time all of the information which they may need in the event of a fire as to all of the buildings which they insured, and thereby unnecessarily increasing the cost of insurance to all policy holders, insurance companies accordingly demand such information only as to buildings that were damaged or destroyed by fire.

That is why, however, the Insurance Code provides that, as to those buildings, insurance companies shall be entitled to immediate and detailed information. That is why the statutory form of policy requires the insured to give immediate notice of a loss to the company, requires him thereafter to file a sworn proof of loss and to submit to an examination under oath, if one is demanded by the company, and finally requires him to submit to (as well as giving him the right himself to insist upon) an appraisal of the amount of his loss.[5]

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[5]The complete provisions of the policy as to those requirements are as follows:

"Requirements in case loss occurs

"The insured shall give written notice to his company of any loss without unnecessary delay, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual

That is the only way in which an insurance company (and all of its other policy holders) can be protected against fraudulent or inflated claims.[6]

Needless to say, the foregoing provisions of the policy are particularly important in a case (such as this case) in which the insured premises as well as their contents were completely destroyed by fire for, in such a case, little, if any, information can be ob-

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cash value and amount of loss claimed; and within 60 days after the loss, unless such time is extended in writing by this company, the insured shall render to this company a proof of loss signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required and obtainable, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost at such reasonable time and place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made."

[6]The policy expressly provides that it shall be void in the event of any fraud or false swearing by the insured, whether before or after the fire. In other words, it contemplates not only that the insured shall furnish all of the necessary information under oath

tained by inspecting the premises themselves after the fire. All that can be appraised is the information made available by the policy holder.

Although plaintiff seemingly contends otherwise, it is clear that an insurance company may insist upon a sworn proof of loss *and* an examination under oath *and* an appraisal and need not be satisfied with less. Moreover, since an examination under oath is obviously intended to amplify the information contained in a sworn proof of loss, it is also clear that such an examination need not be requested until after a proof of loss has been filed.

Similarly, since an appraisal obviously can be had (particularly in the case of premises that were completely destroyed by fire) only after the information on which it will be based has been furnished to the company, it is again clear that an appraisal need not be demanded until after the insured has filed a proof of loss and has been examined under oath.

It is thus apparent that, in this case, defendant was fully justified in not asking for an appraisal earlier than it did. In fact, it could have waited not only until January 7, 1954, when plaintiff submitted to an examination under oath, but until January 13, 1954, when plaintiff finally submitted his amended proof of loss.

Because time had become very short when plaintiff finally indicated his willingness to comply with the

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but also that the insurance company will check that information before paying a loss and that it will not have to pay if the information turns out to have been false or fraudulent.

requirements of the policy, defendant asked for an appraisal on December 23, 1953, without waiting for all of the information to which it was entitled.

If, as a result of the examination under oath, defendant would conclude that an appraisal was unnecessary, it could always advise plaintiff accordingly. If, however, an appraisal still appeared necessary, defendant could at least not be accused of having asked for it too late.

Defendant is not responsible and is not to be held responsible for the delay resulting from plaintiff's refusal to submit to an examination under oath in May of 1953. Plaintiff then took the position that he did not have to submit to such an examination. The Superior Court of the State of California, in and for the County of Shasta, ruled, however, that he should have submitted thereto and its judgment has long since become final.

Plaintiff seemingly contends that the trial judge in the Shasta action was in error in granting the nonsuit and, at the same time, seems to attach some significance to the fact that he himself consented thereto. Needless to say, since the judgment of nonsuit has become final, it makes no difference whether it was erroneous or not. In fact, however, it was entirely proper. With or without plaintiff's consent, the trial judge had no choice but to grant a nonsuit

because of plaintiff's failure to submit to an examination under oath.[7]

Hickman v. London Assurance Corp., 184 Cal. 524, 195 Pac. 45;

Robinson v. National Auto. etc., Ins. Co., 132 Cal. App. 2d 709, 714, 282 P. 2d 930.

Plaintiff also blames defendant for the delay of 47 days which followed the granting of the nonsuit. The law is clear, however, that, having once fixed a date for an examination under oath which plaintiff failed to attend, defendant was under no obligation to do anything further about the matter. On the contrary, it was incumbent upon plaintiff, when he decided that he would submit to an examination after all, to notify defendant accordingly.

Hickman v. London Assurance Corp., 184 Cal. 524, 533-534, 195 Pac. 45;

Bergeron v. Employers' Fire Ins. Co., 115 Cal. App. 672, 676, 2 P. 2d 453.

This, he did, but only 47 days after the nonsuit.

Moreover, plaintiff could not only have avoided the delay by submitting to an examination under oath on May 7, 1953, he could have demanded an appraisal himself.

In this case, all of the delay was caused by plaintiff. He succeeded in postponing his examination under oath for approximately eight months thereby making

[7]In fact, it may well be that, if any one was prejudiced by the granting of the nonsuit, it was defendant and not plaintiff, since defendant may well have been entitled to a nonsuit with rather than without prejudice.

it far more difficult for defendant to check the accuracy of his answers. He similarly succeeded in delaying an appraisal so that the award of the appraisers is certain to be far less reliable than it would have been had it been made in May or June of 1953.

An insurance company is entitled to adjust a claim before it becomes stale, before all of the witnesses are scattered and before it has become impossible to determine, because of the lapse of time, whether the values which the policy holder placed upon his property were inflated.

Thus, if any one was irretrievably prejudiced by the delay in this case, it is defendant and not plaintiff.

Plaintiff places great reliance upon *Bollinger v. National Fire Insurance Company,* 25 Cal. 2d 399, 154 P. 2d 399. That case, however, is altogether distinguishable.

Plaintiff would have this court believe that the issue in that case was the same as that raised in this case (namely, whether the action was premature because of the plaintiff's failure to comply with a condition precedent). Such is not the case. The *Bollinger* case did *not* hold (as plaintiff contends) that the insured could proceed with his action notwithstanding his failure to comply with a condition precedent. It merely held that, under the particular circumstances of that case, the insurance company could not rely on the one year statute of limitation provided for in the policy.

To clarify the distinction, the facts in the *Bollinger* case should be briefly outlined. Bollinger first filed suit on his policy in a municipal court where the action was dismissed because it had been brought less than thirty days after the fire (the policy providing that action could not be brought until thirty days after the fire). Bollinger then filed suit in the Superior Court and that action was in turn dismissed because it had been brought more than one year after the fire.

On appeal, the judgment of the Superior Court was reversed, the Supreme Court holding that the insurance company could not rely on the one year period of limitation because:

(1) The first action in fact had not been prematurely brought, and

(2) In any event, the insurance company had caused the plaintiff's failure to file the second action in time (more than 30 days and less than one year after the fire) by delaying the trial of the first action and not raising the defense of its prematurity until after the one year period had run.

In other words, the court held that equitable considerations (the insurance company's repeated requests for continuances of the trial of the first action without raising its defense to that action) made the statute of limitation inapplicable.

In this case, the situation is entirely different. None of the delay was caused by defendant. All of it was caused by plaintiff.

If the summary judgment is affirmed and if plaintiff files another action and if he is then met with the defense of the statute of limitations, it will then be time enough for him to rely on the *Bollinger* case and for this court (or any other court) to determine whether his reliance on that case is justified. In this action, however, the *Bollinger* case is simply not in point.

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(2) COMPLIANCE WITH THE APPRAISAL CLAUSE WAS A CONDITION PRECEDENT TO PLAINTIFF'S RIGHT TO SUE.

The rule is settled in California that, when demanded, an appraisal of the loss is a condition precedent to the policy holder's right to sue.

Old Saucelito L. & D.D. Co. v. C.U.A. Co., 66 Cal. 253, 5 Pac. 232;

Adams v. Insurance Companies, 70 Cal. 198, 11 Pac. 627;

Hyland v. Millers Nat. Ins. Co. (C.C.A. 9), 91 F. 2d 735, 738.

Plaintiff contends, however, that an appraisal of the loss was not a condition precedent to recovery in this case (1) because the appraisal clause can be invoked only when the parties have failed to agree as to the actual cash value or as to the amount of the loss and, so plaintiff contends, there was no showing of any such disagreement in this case and (2) because the demand for an appraisal was made so late that it could not be completed within the twelve month period of limitation contained in the policy.

We cannot believe that plaintiff is serious about his first contention. The very fact that an appraisal was demanded is proof enough that the parties failed to agree as to the actual cash value or the amount of the loss (particularly since there is no specific requirement in the standard form of policy, as there was before 1950, that the company notify the insured in writing of its disagreement with the amount of loss claimed by him).

In fact, there probably was a sufficient disagreement to justify a demand for an appraisal *by plaintiff* as soon as defendant rejected his proof of loss (April 30, 1953). Be that as it may, however, disagreement was certainly sufficiently expressed by defendant when it demanded the appraisal.

Thus, the real issue is that raised by plaintiff's second contention, namely, that the demand for an appraisal was made too late.

As to that contention, our position is simply that defendant was not required to demand an appraisal until plaintiff had submitted to an examination under oath and had thus made available to defendant the information which would be needed for an appraisal.

Hence, the appraisal, which would have been a condition precedent to recovery had demand therefor been made in May of 1953, continued to be such a condition precedent even though demand therefor was made 32 days before the expiration of the 12 month period of limitation contained in the policy.

To hold (as plaintiff would have this court hold) that compliance with the appraisal clause was not a condition precedent in this case would enable policy holders who do not wish their property appraised to avoid an appraisal by the simple device of delaying submission to an examination under oath.

Plaintiff also contends that compliance with the appraisal clause ceased to be a condition precedent because he did everything within his power to have the appraisal completed within the limitation period. Specifically, plaintiff contends that it could have been completed between January 18 and January 22, 1954, and that defendant is responsible for the failure to complete it during that period.

Once it is remembered, however, that plaintiff himself took one week (from January 6 to January 13, 1954) to select his own appraiser and that the policy gave the appraisers fifteen days to appoint an umpire, it becomes immediately apparent that plaintiff's contention is untenable. If it were well taken, it would simply mean that, by delaying his examination under oath for a sufficiently long period of time and, after an appraisal was demanded, by taking long enough to appoint his own appraiser, the policy holder could speed up the appraisal in such a way as to deprive the insurance company of rights to which it would normally be entitled under the policy.

From May 1, 1953, until January 17, 1954, the delay was exclusively that of plaintiff. Being solely responsible for the fact that the 15 day period for the

appointment of the umpire did not start until January 18, 1954, plaintiff cannot complain of the fact that the umpire was not appointed on the first or second or third or fourth or fifth day of that period.[8]

We have no quarrel with plaintiff's contention that the two conditions of the suit clause of the policy (that all conditions precedent shall have been complied with and that suit be brought within 12 months) must be so coordinated that the insurer's insistence upon one condition will not prevent compliance with the other. We believe indeed that the insured should not be made to suffer from a delay for which the insurer is responsible. In this case, however, it appears as a matter of law that plaintiff and plaintiff alone was responsible for the delay.[9]

The cases cited by plaintiff are all distinguishable.

Koyer v. Detroit F. & M. Ins. Co., 9 Cal. 2d 336, 70 P. 2d 927, upon which plaintiff primarily relies, was decided while the standard form of fire policy

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[8]We realize that whatever happened after this action was filed is not relevant to the question of whether plaintiff was entitled to file it on January 22, 1954. It may be noted, however, that, after defendant's appraiser contacted plaintiff's appraiser on January 27, 1954, the latter delayed the appraisal for almost another year.

[9]On page 25 of plaintiff's brief, the following appears:

> "The policy can not be construed to permit the insurers to so delay the exercise of any requirement of the policy as to put the insured in a position where he cannot enforce his right to recover under the policy."

Under the facts of this case, that sentence may well be paraphrased as follows: the policy cannot be construed to permit the insured to so delay the exercise of any requirement of the policy (examination under oath) as to put the insurer in a position where it cannot enforce another of its rights under the policy (appraisal).

still required that the appraisal be completed within 90 days after the filing of a proof of loss (unless it was delayed by the policy holder).

Appraisers were appointed in that case but the appraisal was not completed within the 90 day period and the policy holder filed suit without waiting for its completion. The court upheld his right to sue because the delay was attributable neither to him nor to his appraiser.

In this case, however, the delay was attributable exclusively to plaintiff. Moreover, now that Section 2071 has been amended (a fact which plaintiff does *not* mention in his brief), the *Koyer* case is in any event inapplicable.

Aetna Insurance Co. v. Hefferlin, 260 Fed. 695, is similarly distinguishable. In that case, which arose under Montana law, the appraisal had been completed but the plaintiff sought to recover damages in excess of the amount awarded him by the appraisers. This court held (1) that the plaintiff was not bound by the award because the appraisers had failed to consider certain items of property which they should have considered and (2) that the plaintiff did not have to submit to a second appraisal since the first one (in which he had participated in good faith) had failed without fault on his part. In this case, however, plaintiff and plaintiff alone was responsible for the failure to complete the appraisal.

Covey v. National Union Fire Ins. Co., 31 Cal. App. 579, 161 Pac. 35, is another case which arose under

a different form of policy. In addition to a ninety day completion clause, the policy involved in that case also contained specific provisions as to when an appraisal should be *demanded* by the company.

Demand was not made within the prescribed period. In fact, it was not received by the policy holder until after the expiration of the 90 day period within which the appraisal should have been completed. Under those circumstances, the court held of course that the policy holder did not have to submit to an appraisal.

In this case, however, the demand for an appraisal was made at the earliest possible time, namely, as soon as plaintiff had agreed to make available to defendant (by way of a *complete* examination under oath) the information which defendant was entitled to have before proceeding with an appraisal.

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(3) DEFENDANT DID NOT WAIVE ITS RIGHT TO DEMAND AN APPRAISAL.

Plaintiff next contends that defendant waived its right to an appraisal by unconditionally denying liability under the policy.

The simple answer to that contention is that defendant never *unconditionally* denied liability.

It is true that, after the filing of the first action, defendant included a general denial of liability in its answer to the complaint, thus putting plaintiff to his proof. *Before the filing of that action,* however, defendant had expressly advised plaintiff that its re-

quest for further proofs of loss and for an examination under oath should be construed as *neither an admission nor a denial of liability.* When the action was filed, therefore, there had been no waiver by defendant of any condition precedent.

It is only a denial *before* the filing of an action (and, as we shall show, not even every such denial) that can operate as a waiver. Although we found no California case on the subject, the distinction between the effect of a denial of liability *before suit* and the effect of a denial *after suit* is clear. See the cases cited at pages 415-416 of the comprehensive annotation in 3 ALR 2d 383. Those cases squarely hold that a denial of liability which first appears in the answer of the insurance company is not such a denial as will amount to a waiver of the appraisal clause.

If plaintiff's contention were sound, the way would be open for a policy holder to bypass all of the requirements of the statutory form of fire policy. All that he would have to do to avoid filing a proof of loss or submitting to an examination under oath or an appraisal would be to file suit immediately after the fire. The insurance company would of course have to plead that, under such circumstances, there was no liability on its part and the policy holder would then be in a position to contend that all conditions precedent included in the policy had been waived. A better example of trying to lift one's self by one's boot straps could hardly be imagined.

After the filing of the first action, defendant had no choice but to include a general denial in its an-

swer. If the conditions with which plaintiff had failed to comply were truly conditions precedent, there was indeed no liability upon defendant's part.

Moreover, it is not the law, as plaintiff would have this court believe, that an insurance company can insist upon an appraisal only when it otherwise admits liability and the only issue between the parties is that of the amount of the loss. There are numerous situations in which more than one defense is available to the insurance company and in which it can deny liability *before* suit is filed and yet insist upon an appraisal of the loss.

To operate as a waiver, a denial of liability must be based upon the claimed invalidity of the policy (or a want of coverage or a forfeiture). As is made clear in the annotation to which we just referred (3 ALR 2d 383, 415-416), the insurance company cannot at the same time claim (1) that there never was a policy (or that it was cancelled or forfeited before the fire) and (2) that it is nevertheless entitled to rely upon a clause of the policy.

This is a far cry from the rule which plaintiff would have this court adopt and under which an insurance company could rely on an appraisal clause only if it relies on nothing else and waives every other defense that it may have under the policy.

If plaintiff were right, an insurance company which has reason to believe that the policy holder set the fire himself could insist upon an appraisal only at the price of waiving its right to show (or try to show)

that he set the fire. It is obvious that such a rule would be unsound and that the insurance company *can* rely on both defenses. (See, for example, *Hyland v. Millers Nat. Ins. Co.,* 91 F. 2d 735, a case decided by this court and in which the insurance company prevailed both because of the policy holder's failure to submit to an appraisal and because of fraud and false swearing on his part in his proof of loss).

In this case, defendant never took the position (not even in its answer to the complaint) that the policy was invalid or that it had been cancelled or forfeited before the fire. The only defenses upon which it relied and on the basis of which it denied liability after suit was filed were defenses *under the policy.* It cannot be held therefore that it is precluded by a "denial of liability" from relying on the appraisal clause.

The case of *Jacobs v. Farmers' Mut. Fire Ins. Co.,* 5 Cal. App. 2d 1, 41 P. 2d 960, upon which plaintiff relies, is altogether distinguishable. In reversing a judgment in favor of the policy holder, the court indicated by way of dictum that, on a retrial of the case, the insurance company could not rely on the appraisal clause of the policy. The court gave various reasons in support of that dictum including the following:

(1) The amount of damages claimed by the policy holder was not disputed. In this case, it was.

(2) No demand for an appraisal had been made by the insurance company; in this case, demand was made.

(3) The insurance company did not plead the plaintiff's failure to submit to an appraisal; in this case, such failure was pleaded.

(4) The insurance company had denied liability before suit was filed on the ground, among others, that the policy had become void before the fire; in this case, there was no denial of liability before suit was filed and, even thereafter, the denial was limited to policy defenses.

Plaintiff also contends that defendant waived its right to ask for an appraisal by not raising plaintiff's failure to submit thereto as a defense in the first action.

If we are right, however, as we believe that we are, in our contention that defendant did not have to ask for an appraisal until such time as plaintiff submitted to an examination under oath, it automatically follows that, at the time when the answer to the first complaint was filed, plaintiff had not yet "failed" to submit to an appraisal and his "failure" to submit thereto could accordingly not yet be relied upon as a defense.

Moreover, since waiver is the intentional relinquishment of a known right with full knowledge of all the facts (see *Wienke v. Rich,* 179 Cal. 220, 176 Pac. 42), there could be no waiver of defendant's right to ask for an appraisal at a time when defendant did not

have the information on the basis of which it could decide whether to ask for an appraisal or not.

Plaintiff places some reliance upon *Landreth v. South Coast Rock Co.,* 136 Cal. App. 457, 29 P. 2d 225, and *Pneucrete v. U.S. Fidelity & G. Co.,* 7 Cal. App. 2d 733, 46 P. 2d 1000. Both cases (neither of which involved a policy of insurance) are distinguishable.

In the *Landreth* case, a judgment for the plaintiff was affirmed on appeal as against the defendant's contention that the dispute should first have been submitted to arbitration as provided in the contract. The court pointed out that, although the defendant had pleaded the agreement to arbitrate, it had taken no steps to procure an arbitration and had tried the case on its merits without urging the agreement to arbitrate at the trial. This, the court held, amounted to a waiver of its right to insist upon arbitration.

In this case, however, the right to demand an appraisal had not yet arisen when defendant filed its answer in the Shasta action. Moreover, unlike the contract involved in the *Landreth* case, the policy in this case provided that suit could not be brought unless all conditions precedent had been complied with.

In the *Pneucrete* case, the court held that submission of the dispute to arbitration was unnecessary (because the action was brought on a statutory bond rather than on the contract which contained the arbitration clause) and that, in any event, the right to insist upon arbitration had been waived because of the defendant's failure to ask for it until the day

before the trial (22 months after it had filed an answer in which no mention of arbitration was made although the plaintiff's failure to arbitrate was then available as a defense).

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(4) THERE WAS NO ESTOPPEL.

Plaintiff next contends that defendant should have been estopped from relying upon his failure to comply with the appraisal clause as a defense.

It is not clear to us how it can be contended that an estoppel arose since it does not appear either that defendant caused plaintiff to change his position or that plaintiff in fact changed his position.

It would seem, however, that this section of plaintiff's brief is merely a restatement of his arguments on the subject of waiver coupled with a restatement of his contention that the policy holder is the one to decide when sufficient information has been furnished to the insurance company and a restatement of his basic contention that it would be unconscionable to allow defendant to "take advantage" of him.

For example, on page 31, plaintiff argues that, although defendant "had full knowledge of all necessary facts", it nevertheless presented its dilatory objections piecemeal, raising one and, when that one had spent its course, raising another. In effect, however, this is merely another way of saying that defendant did not have the right to ask for an examination under oath because it had already been given sufficient information.

Even though plaintiff took the position that "there is an end to this third degree some place" (27), the Superior Court of the State of California, in and for the County of Shasta, ruled that defendant was entitled to at least one examination under oath.

On page 32 of plaintiff's brief, defendant is accused of having sprung a trap upon plaintiff at the trial of the first action. Needless to say, there was no trap. But in any event, the trap, if any there was, was sprung in the answer which defendant filed 3½ months before the trial of the first action and not at the trial of that action. That answer specifically alleged that one of the defenses upon which defendant was relying was the failure of plaintiff to submit to an examination under oath (51).

On page 33 of his brief, plaintiff again complains of the fact that, although the nonsuit was granted on November 4, 1953, defendant did nothing about it until December 23, when it accepted plaintiff's offer to submit to an examination under oath and asked for an appraisal of the loss. We have already shown, however, that the duty rested upon plaintiff, if he wished to proceed with his claim under the policy, to notify defendant that he was now prepared to submit to an examination under oath (see *Bergeron v. Employers' Fire Ins. Co.,* 115 Cal. App. 672, 2 P. 2d 453).

Plaintiff argues further that it is but a natural inference that, at the time when defendant decided to ask for an appraisal, it knew that the appraisal could not be completed before the expiration of the

12 month period of limitations. Conversely, however, it is also a natural inference that plaintiff delayed submitting to an examination under oath until *he* knew that it would be too late for an appraisal should one be requested by defendant.

Finally, on page 35 of his brief, plaintiff seemingly complains of the fact that defendant did not postpone making its demand for an appraisal until after plaintiff had submitted to an examination under oath on January 7, 1954.

There is no doubt that defendant could have done so. Because it realized that time was short and because it wanted to be fair, however, it demanded an appraisal as soon as it became certain that the information which was essential to an appraisal would finally be made available to it.

Fitzpatrick v. North America Acc. Ins. Co., 18 Cal. App. 264, 123 Pac. 209, upon which plaintiff relies, supports defendant's rather than plaintiff's position. The case was decided in favor of the insurance company rather than in favor of the insured although the opinion does contain the language which plaintiff quotes on page 36 of his brief. That language was of course only dictum since, in the *Fitzpatrick* case as in this case, there was neither bad faith on the part of the insurance company nor any conduct that made it impossible for the policy holder to comply with the requirements of the policy.

Amusement Syndicate Co. v. Prussian National Ins. Co., 85 Kan. 367, 116 Pac. 620, is also distinguishable. The insurance company in that case waited more than

one year (until after the filing of the action) to demand an appraisal. It could have demanded it soon after the fire, however, so that it, and not the policy holder, was responsible for the delay.

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(5) LEAVE TO FILE A SUPPLEMENTAL COMPLAINT WAS PROPERLY DENIED.

Since, as we have demonstrated, plaintiff had no cause of action when he filed suit on January 22, 1954, the District Court properly denied him leave to file his proposed supplemental complaint.

Bonner v. Elizabeth Arden, Inc., (C.A. 2), 177 F. 2d 703, 705;

Bowles v. Senderowitz (U.S. D.C., E.D. Pennsylvania), 65 F. Supp. 548, 551, and *Porter v. Senderowitz* (C.C.A. 3), 158 F. 2d 435, 438;

United States Pipe & Foundry Co. v. James B. Clow & Sons (U.S. D.C., N.D. Alabama, S.D.), 145 F. Supp. 380.

Neither *Popovitch v. Kasperlik* (U.S. D.C., W.D. Pennsylvania), 76 F. Supp. 233, nor *Kimmel v. Yankee Lines* (U.S. D.C., W.D. Pennsylvania) 125 F. Supp. 702, affirmed in *Kimmel v. Yankee Lines* (C.A. 3), 224 F. 2d 644, which plaintiff cites, is in point.

In the *Popovitch* case, leave to file a supplemental complaint was denied. In the *Kimmel* case, a supplemental answer was allowed but there was no question as to the sufficiency of the original answer.

CONCLUSION.

Compliance with the appraisal clause was a condition precedent to plaintiff's right to sue.

There was no waiver, no estoppel, no dilatory tactics (except plaintiff's) and no entrapment.

Finally, leave to file a supplemental complaint was properly denied.

Both the judgment and the order appealed from should accordingly be affirmed.

Dated, San Francisco, California,
February 20, 1957.

Respectfully submitted,
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